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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

NO. 257

In the Matter of The Chicago, Rock Island and Pacific Railway Company, Debtor.

STATE OF TEXAS,
Petitioner,

vs.

EDWARD E. BROWN, et al., etc.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

PRESS OF VON BOECKMANN-JONES CO., AUSTIN, TEXAS

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To the Honorable Supreme Court of the United States and the Honorable Chief Justice and Associate Justices of Said Court:

The Petitioner, The State of Texas, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an appeal from a final decree carrying into consummation the previously approved and confirmed

plan of reorganization of the Chicago, Rock Island and Pacific Railway Company and its subsidiaries, including the Chicago, Rock Island & Gulf Railway Company, a Texas corporation, under Section 77 of the Bankruptcy Act. The original petition was approved July 7, 1933, and the final decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, was entered on December 30, 1947. (R, 177.)

On December 8, 1947, pursuant to the provisions of Section 5(2)(b) of the Interstate Commerce Act, the Interstate Commerce Commission notified the Governor of Texas by letter that the Reorganization Managers had filed with the Interstate Commerce Commission on December 8, 1947, their application for an order authorizing for the purpose of carrying out the plan (a) the acquisition by the reorganized company of the properties of the principal debtor, the Chicago, Rock Island and Pacific Railway Company, and one of the subsidiary debtors, the Chicago, Rock Island and Gulf Railway Company, a Texas corporation (R, 79-85), and requesting the Governor to notify the Interstate Commerce Commission or have it notified by any other appropriate authority of the State of Texas within fifteen days from the date thereof whether any representations would be made in the premises on behalf of the State or its people. (R, 77-78.)

Pursuant to such notice the State of Texas duly made and filed its written protest to the application of the Reorganization Managers with the Interstate Commerce Commission on or about December 19, 1947. Such written protest, after setting forth its various legal grounds and objections, contained a prayer on behalf of the State of Texas as protestant to be heard

in person or by counsel upon brief and at the oral argument if oral argument was granted thereon, at the hearing upon the application of the Reorganization Managers for the approval of the order therein prayed for. (R, 126-138.)

The State of Texas never received any notice of the date set for the hearing upon the application of the Reorganization Managers, and the first intimation received by the State of Texas of the action of the Commission upon such application was the receipt through the United States mail on Saturday, December 27, 1947, of a copy of the order made and entered by Division 4 of the Interstate Commerce Commission on December 23, 1947, overruling the protest of the State of Texas without further hearing. (R, 159-161.)

On December 19, 1947, the Reorganization Managers filed in the District Court their petition for the Consummation Order and Final Decree (R, 79-85), wherein, among other matters, the Reorganization Managers recommended that they be authorized to cause the Chicago, Rock Island and Gulf Railway Company, a Texas corporation, subsidiary of the debtor, to be dissolved according to applicable state laws (R, 80); that the Court enter Consummation Order and Final Decree vesting the property of the subsidiary debtor Chicago, Rock Island and Gulf Railway Company, a Texas corporation, in the reorganized company and authorizing and directing in all other respects the Consummation of the Plan of Reorganization (R, 84), which plan of reorganization directed the Reorganization Managers to take or supervise the taking by the reorganized company of any and all other action necessary "to perfect the incorporation of said reorganized company under the laws of the State of Delaware and to qualify

it to transact business as a foreign railroad corporation in such states as may be required by law" (R, 75).

On December 26, 1947, the State of Texas filed with the Clerk of the District Court its motion to intervene as a party defendant in Cause No. 53209, styled "In the Matter of the Chicago, Rock Island and Pacific Railway Company, Debtor," in manner and form as provided by law. (R, 130-138.) On December 30, 1947, the Court considered the motion to intervene and the objections thereto (R, 158-174) and granted the State of Texas permission to intervene as party defendant (R, 139) and file its objections and answer, which objections and answer were thereupon filed instanter. (R, 173.)

The Court having announced its intention to sign the Consummation Order and Final Decree as prayed for by the Reorganization Managers, the State of Texas, Intervenor, in open court requested the Court to grant a thirty-day stay of execution of such order, which was by the Court denied. (R, 175-176.)

On December 30, 1947, the Court entered its order styled "Consummation Order and Final Decree" (R, 177-211), which provided, among other things, (1) for the transfer to and vesting in the Chicago, Rock Island and Pacific Railroad Company, a Delaware corporation, of all right, title, and interest of the Chicago, Rock Island and Gulf Railway Company, a Texas corporation, and of the trustees of its property, in and to all of its properties of every kind and description, including its rights, privileges, and franchises, the laws of any state or the decisions or rulings of any state authority notwithstanding, effective at 12:01 A.M., Central Standard Time, January 1, 1948 (R, 188); and (2) for the dissolution by the reorganized

company under the supervision of the Reorganization Managers of the Chicago, Rock Island and Gulf Railway Company, a Texas corporation, required or appropriate under the laws of the State of Texas. (R, 207.)

On December 30, 1947, in accordance with the Federal Rules of Civil Procedure, Intervenor filed its notice of appeal to the United States Circuit Court of Appeals for the Seventh Circuit (R, 212-213) and its bond for costs. (R, 219.)

On December 31, 1947, Intervenor filed its Motion for an Order Staying the Execution of the Consummation Order and Final Decree of December 30, 1947, pending disposition of the appeal with the Circuit Court of Appeals for the Seventh Circuit, which motion was by the Court denied.

On June 2, 1948, the United States Circuit Court of Appeals for the Seventh Circuit affirmed the judgment of the trial court. (R, 270.) Appellant in due time filed its petition for rehearing (R, 270) which was by the Court denied on June 29, 1948. (R, 287.)

II.

STATEMENT AS TO JURISDICTION

1. The date of the judgment of the Circuit Court of Appeals, Seventh Circuit, sought to be reviewed is June 2, 1948 (R, 270), and the opinion of the Court (R, 260-269) is reported in 168 F. 2d 587. Appellant's petition for rehearing, filed on June 16, 1948, (R, 270) was entertained by the Court and was denied on June 29, 1948. (R, 287.)

2. (a) The Circuit Court of Appeals has decided

an important question of general law in conflict with the decision of the Third Circuit Court of Appeals in In re Central Railway Company of New Jersey, Appeal of the State of New Jersey, 136 Fed. (2d) 633 (cert. den. 320 U.S. 805), and the decision of this Court in Railroad Commission of California v. Pacific Gas & Electric Company, 302 U.S. 388, Windsor v. McVeigh, 93 U.S. 274 and other decisions of this Court.

(b) The Circuit Court of Appeals has decided an important question of general law in conflict with the decision of the Fifth Circuit Court of Appeals in Benton v. Callaway, 165 Fed. (2d) 877, and the decision of this Court in Palmer v. Massachusetts, 308 U.S. 79, and other decisions of this Court, in the construction of the provisions of Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205), and Section 5 of the Interstate Commerce Act (49 U.S.C. Sec. 5) relating to the merger and consolidation of railroads.

3. The jurisdiction of this Court is invoked under the provisions of Section 24(c) of the Bankruptcy Act (11 U.S.C.A. Sec. 47(c)) and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A., Sec. 347(a)), or Section 1254(l) of the Judicial Code, Act of June 25, 1948 (28 U.S.C.A., Sec. 1254(l), effective September 1, 1948.

III.

QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT WHICH SHOULD BE SETTLED BY THIS COURT

The United States Circuit Court of Appeals for the Seventh Circuit decided that proceedings for railroad

reorganization under Section 77 of the Bankruptcy Act are wholly controlled by the terms thereof and that the provisions of Section 5 of the Interstate Commerce Act fixing terms and conditions for the merger and consolidation of railroads are not applicable thereto. The holding by the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is directly contrary to the holding of the United States Circuit Court of Appeals for the Fifth Circuit in the case of Benton v. Callaway, 165 Fed. (2d) 877 (Cert. granted by the Supreme Court of the United States March 15, 1948, No. 607). This is an important question of federal law which has not and should be settled by this Court.

IV.

THE QUESTIONS PRESENTED

The following questions are presented for decision:

1. Whether the ruling of the Interstate Commerce Commission in denying the State of Texas the opportunity to be heard as prayed for in its protest containing its objections to the plan at the hearing on the consummation application constituted a denial of due process of law which deprived the District Court of jurisdiction to enter the consummation order and final decree of December 30, 1947.

2. Whether the findings required by the Interstate Commerce Commission under Subsections 2(b), (c) and (f) of Section 5 of the Interstate Commerce Act, (Tit. 49 U.S.C. Sec. 5) in proceedings for merger or consolidation of railroads are mandatory in proceedings under Section 77 of the Bankruptcy Act. (11 U.S.C. Section 205.)

3. Whether the failure of the Interstate Commission to make affirmative findings based upon substantial evidence that compliance with the Constitution and laws of the State of Texas would be inconsistent with the national transportation policy or a burden on interstate commerce or inimical to the public interest constituted legal grounds for the finding of the Interstate Commerce Commission and the decree of the District Court that the plan of reorganization provided was compatible with the public interest and not inconsistent with the purposes of the Interstate Commerce Act, notwithstanding the Constitution and laws of the State of Texas.

4. Whether the failure of the plan of reorganization as approved to provide for the preservation of the rights of the employees of the Chicago, Rock Island and Gulf Railway Company under the provisions of Section 5(2), (c) and (f) of the Interstate Commerce Act (49 U.S.C. Sec. 5) without a fair and equitable arrangement based upon evidence introduced in a hearing before the Interstate Commerce Commission as provided by law was inconsistent with the provisions of the Interstate Commerce Act as amended by the Transportation Act of 1940.

V.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. In holding that the Interstate Commerce Commission was justified in declining to entertain the objections of the State of Texas, thereby denying it the opportunity to be heard as prayed for in its protest,

and depriving the State of Texas of due process of law, both as to notice and an opportunity to be heard, since nothing urged in such protest would afford any basis for relief by the Interstate Commerce Commission, the Circuit Court of Appeals has decided an important question of general law in a way that is untenable, and its decision on that question is in direct conflict with the provisions of Section 5, Subsection 2(b) of the Transportation Act of 1940, 49 U.S.C.A. § 5(2)(b) and the decision of the Third Circuit Court of Appeals in In re Central Railway Company of New Jersey, appeal of the State of New Jersey, 136 Fed. (2d) 633 (cert. den. 320 U.S. 805) and the decision of the Supreme Court of the United States in Railroad Commission of California v. Pacific Gas & Electric Company, 302 U.S. 388, Windsor v. McVeigh, 93 U.S. 274, and other decisions of the Supreme Court of the United States.

The rule laid down by the Supreme Court of the United States and applied without exception is this:

> "There must be due notice and an opportunity to be heard, the procedure must be consistent with the essential of a fair trial, and the Commission must act upon evidence and not arbitrarily." (Per Chief Justice Hughes in Railroad Commission of California v. Pacific Gas and Electric Co., 302 U.S. 388 at page 93).

In In re Central Railway Company of New Jersey, appeal to the State of New Jersey et al., 136 Fed. 633 (cert. den. 320 U.S. 805), the Circuit Court of Appeals for the Third Circuit again announced the true rule as follows:

> "The right to notice and a hearing is one of ancient origin and by the due process clauses of the

> 5th and 14th amendments has been safeguarded to all against deprivation by the Federal Government and the States, respectively. *The fact that the State had notice and appeared is not sufficient to satisfy the requirement of due process. It must also have been afforded an opportunity to be heard.*"*

In the present case the Circuit Court of Appeals, refusing to apply the above rule, has held that "the Commission was entirely justified in the plan to entertain the Texas objections which were, in effect, an effort to change the terms of an approved and confirmed plan to which the State had never objected." (R, 267) for the reason that the objections to the confirmed plan were not entered at "the proper time or place" (R, 266) and "even had the state been present at the time and urged all that has been presented to the District Court and this Court, the result necessarily would have been the same." (R, 269.)

The holdings of the Circuit Court of Appeals as thus expressed in the instant case are in direct conflict with the rules of law laid down by this Court and the Circuit Court of Appeals for the Third Circuit as above set forth.

2. In holding that "the fact that the plan may infringe upon the provisions of the Texas Constitution and laws is wholly immaterial against bankruptcy jurisdiction" (R, 268) without affirmative findings by the Interstate Commerce Commission that compliance with the Constitution and laws of the State of Texas would be inconsistent with the national transportation policy or a burden on interstate commerce or inimical to the public interest, the Circuit Court of Appeals has decided an important question of general law in a

*Italics throughout are supplied unless otherwise indicated.

way that is untenable, and its decision in that question is in conflict with the Circuit Court of Appeals for the Fifth Circuit in Benton v. Callaway, 165 Fed. (2d) 877 and the decision of this Court in Palmer v. Massachusetts, 308 U.S. 79 and with other decisions of this Court in the construction of the provisions of Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205) and Section 5 of the Interstate Commerce Act (49 U.S.C. Sec. 5) relating to the merger and consolidation of railroads.

The rule of law laid down by this Court in the case of Palmer v. Massachusetts, 308 U.S. 79, at page 87 is as follows:

> "But the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.
>
> "The judicial process in bankruptcy proceedings under Section 77 is as it were brigaded with the administrative process of the Commission."

The Circuit Court of Appeals for the Fifth Circuit in Benton v. Callaway, 165 Fed. (2d) 877, at page 883 (writ of certiorari granted, No. 607, March 15, 1948), again announced this rule (citing Palmer v. Massachusetts, 308 U.S. 79, Smith v. Hoboken R. Co., 328 U.S. 123, and Warren v. Palmer, 310 U.S. 132) as follows:

> "The judicial process is brigaded with the administrative process in reorganization proceedings under Section 77 . . .
>
> ". . . Upon confirmation of the plan, which is subject to judicial review, the debtor, or any other corporation organized for the purpose of carry-

> ing out the plan, shall have full power to put it into effect; and shall do so: the laws of any state to the contrary notwithstanding. *Evidently there must be a real or substantial conflict between the plan and any state law before the latter may be disregarded.* The execution of the plan is 'subject to the supervision and control of the judge,' Sec. 205, sub. f, supra; and this ought to be assurance enough that state authority will be overriden only to the extent necessary to make the plan effective . . ."

3. In holding that "the Commission has made every effort to follow the requirements and has complied with all of the provisions of the Bankruptcy Act, and none of its findings is inconsistent with the power of the Commission under the Interstate Commerce Act" (R, 269), the Circuit Court of Appeals has decided an important question of general law in a way that is untenable and contrary to the provisions of Section 5, Subsections (2)(c) and (f) and (11), 49 U.S.C., as construed by the Supreme Court of the United States in Palmer v. Massachusetts, 308 U.S. 79.

The Circuit Court of Appeals held that "we find nothing in the plan or in the proceedings or offered by appellant to impeach the findings of the Commission that the plan is 'compatible with the public interest' and not inconsistent with the Interstate Commerce Act. The Commission has made every effort to further the requirements and has complied with all of the provisions of the Bankruptcy Act and none of its findings is inconsistent with the powers of the Commission under the Interstate Commerce Act." (R, 268-269.) By proper assignments of error (Point IX, R, 217-218) and again in the Petition for Rehearing (Assignment of Error VIII, R, 277), the attention of

the Circuit Court of Appeals was directed to the failure of the plan of reorganization to contain a fair and equitable arrangement to protect the interests of the employees of the Texas corporation under the provisions of Section 5(2)(c) (f) of the Interstate Commerce Act (49 U.S.C. Sec. 5), despite the order of the Interstate Commerce Commission dated July 31, 1941 (247 I.C.C. 533 at page 576),[1] which ordered such arrangement as a condition precedent to the approval of the plan by the Commission, it being undisputed that no hearings were held by or evidence introduced before the Interstate Commerce Commission in compliance with such order.

The Circuit Court of Appeals failed to rule upon such assigned error, thereby failing to rule upon an important question of Federal law which should be decided by this Court.

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be issued as of and under the Seal of this Honorable Court and directed to the Court of Civil Appeals for the Seventh Circuit, directing that Court to certify and send to this Court for its review and determination on the day to be named therein a transcript of the record and the proceedings herein; that the judgment of said Circuit Court be reversed insofar as it affirmed the Consummation Order and Final Decree of the District Court for the Northern District of Illinois, Eastern Division, entered December 30, 1948 (R, 177-211), providing for (1) the transfer to and vesting in the Chicago, Rock Island and Pacific Railroad Company of all right, title, and interest in and to the properties of the Chicago, Rock Island and Gulf

[1]Original record (p. 320), Printed Pamphlet, Plan of Reorganization, (p. 195).

Railway Company, a Texas corporation, and of the trustees of its properties; and (2) for the dissolution by the reorganized company under the supervision of the Reorganization Managers of the Chicago, Rock Island and Gulf Railway Company, a Texas corporation, and that your Petitioners have such other and further relief in the premises as this Honorable Court may deem meet and just.

Respectfully submitted,

THE STATE OF TEXAS, *Petitioner,*

By PRICE DANIEL,
Attorney General of Texas

By C. K. RICHARDS,
Assistant Attorney General

Address: State Capitol
Austin, Texas

IN THE

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NO. ———

In the Matter of The Chicago, Rock Island and Pacific Railway Company, Debtor.

STATE OF TEXAS,

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vs.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals (R, 260-269) is reported in 168 F. 2d 587.

II.

Preliminary Statement.

The Summary Statement of the Matter Involved, Statement as to Jurisdiction, and Statement of Questions Presented appear in the foregoing Petition for

Certiorari (ante, pages 1-8), and are adopted without repetition.

III.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the Interstate Commerce Commission was justified in declining to entertain the objections of the State of Texas, since nothing therein urged would afford any basis for relief by the Interstate Commerce Commission because such holding deprived Appellant of due process of law both as to notice and an opportunity to be heard, contrary to the provisions of Section 5, Subsection 2(b) of the Transportation Act of 1940.

2. The Circuit Court of Appeals erred in holding that "even had the State been present at the time and urged all that it has presented to the District Court and this Court, the result necessarily would have been the same," since such holding is contrary to the decision of the Supreme Court of the United States in Windsor v. McVeigh, 93 U.S. 274, and the Third Circuit Court of Appeals in In re Central Railway Co. of New Jersey, appeal of State of New Jersey et al., 136 F. 2d 633 (cert. den. 320 U.S. 805) and in violation of due process of law.

3. The Circuit Court of Appeals erred in holding that the objections filed by the State of Texas in the proceedings before the Interstate Commerce Commission were "in effect, an effort to change the terms of an approved and confirmed plan," since such objections were directed to substantive defects as a matter of law contained in the plan and to the omission of

required findings of the Commission under substantial evidence to be adduced before it, the absence of which affected the legality thereof under the provisions of Section 5(2) and (11) of the Interstate Commerce Act (49 U.S.C. Sec. 5(2) (11).

4. The Circuit Court of Appeals erred in holding that the powers of the Interstate Commerce Commission under the provisions of Section 77 of the Bankruptcy Act are limited to the findings that the plan shall be compatible with the public interest and not inconsistent with the purposes of the Interstate Commerce Act as being contrary to the provisions of Section 5(11), 49 U.S.C.

5. The Circuit Court of Appeals erred in holding that the findings of the Interstate Commerce Commission involved in the case of Seaboard Air Line Railway Co. v. Daniel, 333 U.S. 118, were almost identical with the findings of the Interstate Commerce Commission in the instant case, since the findings in the Seaboard Air Line case constituted affirmative findings that compliance with State laws would be an unnecessary and undue burden on interstate commerce and not in accord with the national transportation policy and would not be consistent with the public interest; and in the instant case no such findings were made or any evidence introduced before the Interstate Commerce Commission which would have supported such findings, if made.

6. The Circuit Court of Appeals erred in holding that the following decisions: In re N. Y., N. H. & H. R. Co., 147 F. 2d 40, 51 (CCA2, 1945), cert. den. 325 U.S. 884; Texas v. U. S., 292 U.S. 522; In re Missouri Pacific R. Co., 39 F. Supp. 436, 438; Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118, authorized the Inter-

state Commerce Commission to refuse Appellant the relief sought by it upon the evidence adduced before the Commission, since the findings herein failed to affirmatively hold that compliance with the Constitution and laws of Texas would be burdensome on interstate commerce or inimical to public interest or would not be consistent with the public interest or inimical to the national transportation policy.

7. The Circuit Court of Appeals erred in failing to pass upon the question as to whether or not the confirmed and approved plan provided for the preservation of the rights of the employees of the Chicago, Rock Island and Gulf Railway Company under the provisions of Section 5(2)(c) and (f) of the Interstate Commerce Act in the absence of a compliance with the order of the Interstate Commerce Commission dated July 31, 1941 (247 I.C.C. 533, 576), wherein the Interstate Commerce Commission ordered that as a condition for its approval of the conveyance of the properties of the Chicago, Rock Island and Gulf Railway Company to the reorganized company a fair and equitable arrangement to protect the interests of the railway employees affected as required by law should be made, inasmuch as the plan failed to contain any provisions for the preservation of the rights of the employees of the Texas corporation pursuant thereto, based upon a hearing before the Interstate Commerce Commission or supported by any evidence.

IV.

Summary of Argument.

1. The order entered by the Interstate Commerce Commission on December 23, 1947, granting the author-

izations requested by the Reorganization Managers without further proceedings after the filing of the written protest by the State of Texas was illegal and void as being contrary to the provisions of Section 5, Subsection (2)(b) of the Interstate Commerce Act, the State of Texas having been deprived of the due notice and opportunity to be heard required by law.

2. The findings required by the Interstate Commerce Commission under Subsections 2(b), (c) and (f) of Section 5 of the Interstate Commerce Act (Tit. 49 U.S.C. Sec. 5) in proceedings for merger or consolidation of railroads are mandatory in proceedings under Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205.)

3. In the absence of an affirmative finding by the Interstate Commerce Commission that the maintenance of the corporate structure of the Chicago, Rock Island and Gulf Railway Company as a Texas corporation would be in violation of the Constitution and laws of the United States, the District Court was without jurisdiction to enter that part of the Consummation Order and Final Decree ordering the merger and consolidation of the franchises and properties of the Texas corporation with the reorganized company and directing the reorganized company under the supervision of the Reorganization Managers to dissolve the Texas corporation and to secure a permit for the reorganized company to own, maintain, and operate a railroad within the State of Texas in violation of the Constitution and laws of Texas.

4. The failure of the approved plan of reorganization to provide for the preservation of the rights of the employees of the Chicago, Rock Island and Gulf Railway Company under the provisions of Section 5(2)(c) and (f) of the Interstate Commerce Act (49

U.S.C. Sec. 5) by a fair and equitable arrangement based upon evidence introduced at a hearing before the Interstate Commerce Commission, being inconsistent with the provisions of the Interstate Commerce Act as amended by the Transportation Act of 1940, rendered the plan, and the final decree of the District Court based thereon, invalid as a matter of law.

V.

ARGUMENT

1. The order entered by the Interstate Commerce Commission on December 23, 1947, granting the authorizations requested by the Reorganization Managers without further proceedings after the filing of the written protest by the State of Texas was illegal and void as being contrary to the provisions of Section 5, Subsection (2) (b) of the Interstate Commerce Act, the State of Texas having been deprived of the due notice and opportunity to be heard required by law.

In addition to the factual situation set forth in the Summary Statement of the Matter Involved (Petition for Certiorari, pages 1-4, it is deemed necessary to present the following additional facts:

After the receipt of the notice from the Interstate Commerce Commission, dated December 8, 1947, to which was attached the copy of the application of the Reorganization Managers (referred to in the Summary Statement of the Matter Involved), the Reorganization Managers amended the application for order, which amended application was filed with the Interstate Commerce Commission on December 19, 1947 (R, 236-240); but no notice of the amendment or copy

thereof was ever furnished to or served upon the State of Texas through its Governor, the Railroad Commission, or the Attorney General by either the Interstate Commerce Commission or the attorneys for the Reorganization Managers. (R, 160-161.)

On December 23, 1947, the Interstate Commerce Commission entered its order in Finance Docket No. 10028 styled "In the Matter of The Chicago, Rock Island & Pacific Railway Company Reorganization," which recites the submission of the application to Division 4 of the Interstate Commerce Commission on December 23, 1947, at which submission Kenneth F. Burgess and Ray Garrett appeared for the Reorganization Managers (R, 86-119), which order contained the following statements:

> "We conclude that we should grant the authorizations requested without further proceedings." (R, 89.)
>
> "*It is further ordered,* That the request of the State of Texas, as described in the accompanying report, for modification of the plan and *for the opportunity to be further heard be, and it is hereby, denied.*" (R, 119.)

There can be no doubt from the undisputed factual situation (1) that Petitioner did not receive notice of the filing of the amended application of the Reorganization Managers filed with the Interstate Commerce Commission or a copy thereof; and (2) that the Interstate Commerce Commission affirmatively refused Petitioner an opportunity to be *heard* in person upon its written protest at the hearing held before the Interstate Commerce Commission on December 23, 1947, on the application of the Reorganization Managers.

That the proceedings before the Interstate Com-

merce Commission on December 23, 1947, were an integral part of and formed the basis for the entry of the Consummation Order and Final Decree by the District Court on December 30, 1947, is evidenced by the wording of Subdivision (f) of Section 77 of the Bankruptcy Act, as well as the finding of the District Court under Subdivision (D) of the Consummation Order and Final Decree. (R, 178-179.)

The Circuit Court of Appeals held:

> "True, Texas did file a protest with the Commission within fifteen days after December 8, 1947, claiming that the proposed transfer was not authorized by Section 77 of the Bankruptcy Act and was contrary to Texas law. But that, we think, was not the proper time or place. Upon that the Commission said: 'These objections to the confirmed plan may not be entertained by us in the present proceeding. . .' (R, 266.)
>
> ". . .
>
> "The Commission thereupon denied the request of the State of Texas for modification of the plan or the opportunity to be heard further, and approved the proposed consummation presented by the managers. . .' (R, 266.)
>
> ". . .
>
> "But in the present proceeding the Commission was not passing upon the propriety of the plan. This it had done when it first approved the plan in October, 1944. The only duty of the Commission, on the managers' application, was to assure itself that the transfer and other proposed transactions were those contemplated by the approved and confirmed plan and *were not inconsistent with the Interstate Commerce Act.* In that situation we think that the Commission was entirely justified in declining to entertain the Texas objections

which were, in effect, an effort to change the terms of an approved and confirmed plan, to which the State had never objected.

"But even had the objections been presented at an opportune stage of the proceeding, nothing now urged would afford any basis for relief. . . (R, 267-268.)

". . .

". . . And even had the State been present at the time and urged all that it has presented to the District Court and this Court, the result necessarily would have been the same." (R, 269.)

Beginning with the case of Interstate Commerce Commission v. Louisville and Nashville Railway Company, 227 U.S. 88 (1913) down to and including the case of Morgan v. United States, 304 U.S. 1 (1937), it has been the unquestioned law of the land that due notice and hearing are guaranteed under the Federal Constitution to all parties, *even* before semijudicial administrative bodies.

As was said by Chief Justice Hughes in Railroad Commission of California v. Pacific Gas & Electric Company, 302 U.S. 388, at page 393:

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292, 304, 305. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily." (Citing cases.)

To the same effect is the case of Ohio Bell Telephone Company v. Public Utilities Commission of Ohio, 301

U.S. 292, 305, wherein the Court, after discussing the right to a fair and open hearing, stated as follows:

> "There can be no compromise on the footing of convenience or expediency, or *because of a natural desire to be rid of embarrassing delay,* when that minimal requirement has been neglected or ignored."

This fundamental rule of law was again restated by the Circuit Court of Appeals for the Third Circuit in the case of In re Central Railway Company of New Jersey, appeal of the State of New Jersey et al., 136 Fed. (2d) 633 (cert. den. 320 U. S. 805), wherein the facts were almost identical with the instant case. The opinion is in part as follows:

> "The cornerstone of the defense to an adjudication of the state's claims upon the basis of the terms of the tax settlement acts is that the acts are unconstitutional. *Before making such an adjudication the opportunity for a hearing and argument upon that issue should have been accorded the Attorney General.* The right to notice and a hearing is one of ancient origin and by the due process clauses of the 5th and 14th amendments has been safeguarded to all against deprivation by the federal government and the states, respectively. *The fact that the state had notice and appeared is not sufficient to satisfy the requirement of due process. It must also have been afforded an opportunity to be heard.*"

When the Interstate Commerce Commission notified the Governor of Texas on December 8, 1947, that the State of Texas had 15 days within which to notify the Interstate Commerce Commission "whether any representations will be made in the premises on behalf of the State or its people," it constituted a summons to the State or its representatives to appear before the

Commission and make such representations as might be desired as to why the plan of reorganization should not be finally approved.

In the case of Windsor v. McVeigh, 93 U.S. 274 at pages 277, 278 Mr. Justice Field said:

> ". . . But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; *it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered.* A denial to a party, of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. *It would be like saying to a party: appear, and you shall be heard; and, when he has appeared, saying: your appearance shall not be recognized, and you shall not be heard.*"

There was a hearing before the Interstate Commerce Commission at which the attorneys for the Reorganization Managers were present (R, 86-87), but the State of Texas was given no notice of the date of the hearing or afforded an opportunity to be present or to be heard. (R, 159-161.)

In view of the plain and unmistakable rule of law laid down by this Court in the cited cases, it is submitted that the order of the Interstate Commerce Commission entered December 23, 1947, was void as a matter of law; and hence that part of the Consummation Order and Final Decree predicated thereon authorizing the transfer to and acquisition by the reorganized company of the franchises and properties of the Chicago, Rock Island and Gulf Railway Company and the dissolution of its corporate entity is of no legal force and effect and should be set aside.

2. The findings required by the Interstate Commerce Commission under Subsections 2(b), (c) and (f) of Section 5 of the Interstate Commerce Act (Tit. 49 U.S.C. Sec. 5) in proceedings for merger or consolidation of railroads are mandatory in proceedings under Section 77 of the Bankruptcy Act (11 U.S.C. Section 205).

Prior to 1935 the jurisdiction and authority to merge and consolidate railroad corporations engaged in interstate commerce was vested in the Interstate Commerce Commission under the Act to regulate Commerce approved February 4, 1887, as amended by the Transportation Act of 1920, and particularly Section 5 thereof which provided in Subparagraph 8 that such consolidations would be free from the restraints of the anti-trust laws and "all other restraints or prohibitions, state or federal, insofar as may be necessary . . ."

In August, 1935, the Congress amended Section 77 of the Bankruptcy Act (11 U.S.C.A. § 205) to permit reorganization of railroads engaged in interstate commerce by filing a petition in bankruptcy, and providing in Paragraph (b) that the plan of reorganization should provide adequate means for the execution of the plan which may include ". . . the merger or consolidation of the debtor with other railroad corporations. . . ." In Section 205(f) it was provided that upon confirmation of the plan the same should be carried out, "the laws of any state or the decisions of any state authority notwithstanding." The same section also provided that "upon confirmation of a plan, the Commission shall without further proceedings, grant authority for . . . the consolidation or merger of the debtor's property *not inconsistent with the provisions*

and purposes of Chapter 1, Title 49, as on August 27, 1935, or thereafter amended."

In 1940 the Congress enacted Public Law 785, 76th Cong., Ch. 722, 3rd Sess., S. 2009, known as "The Transportation Act of 1940," approved September 18, 1940. Section 5 of the Interstate Commerce Act (49 U.S.C.A., 5), the subject of which is "combinations and consolidations of carriers," was amended by Section 7 of Public Law No. 785 and in the amendment Subsection (11) materially changed the provisions of the former law.

Subsection (11) of Section 5 of the Interstate Commerce Act as amended by the Transportation Act of 1940, gave *exclusive and plenary authority* to the Commission in the matter of merger and consolidation of railroads for the purpose of carrying out the national transportation policy as declared by the Congress in Section 1 of the amendment. This delegation of authority is plain and unambiguous, and from the declaration of policy in the Act it is clear that Congress intended to vest in the Interstate Commerce Commission the sole power and authority to decide whether the approval of a merger or consolidation of railroad carriers was for the best interests of the national transportation policy affecting the public as a whole. The prior delegation to the District Court under Section 77 of the Bankruptcy Act to effect mergers and consolidations under Paragraph (b) was even then limited by the provision of Paragraph (f) that the plan should not be inconsistent with the provisions and purposes of the Interstate Commerce Act as amended, including Section 5 thereof.

It will be noted that although Section 77 of the Bankruptcy Act in 1935 gave the Bankruptcy Court ex-

clusive jurisdiction to effect mergers and consolidations of railroads pursuant to its terms, subject only to the limitation imposed upon the Commission by Paragraph (f) above referred to, in 1940 the Congress by amending Section 5 of the Interstate Commerce Act gave the Interstate Commerce Commission *exclusive and plenary* authority over the merger and consolidation of railroads for the purpose of benefiting the national transportation policy as a whole. Hence we have a grant of jurisdiction to the United States District Court over mergers and consolidations of railroads limited only by the function of the Interstate Commerce Commission referred to in Section 77(f), and another and *later* grant of exclusive and plenary authority over the same subject to the Interstate Commerce Commission by Section 5(11) of the Interstate Commerce Act. Seemingly the two repugnant acts cannot stand together.

Under the rules of statutory construction laid down by this Court in the case of United States v. Borden Company, 308 U.S. 188, at p. 199, "when there are two acts upon the same subject, the rule is to give effect to both if possible," it would seem that the intention of Congress was manifested in Section 77 by giving the Interstate Commerce Commission power to enter its final order upon the plan as confirmed by the Judge *only* if the plan was not inconsistent with the intentions and purposes of the Interstate Commerce Act as amended by the Transportation Act of 1940. With this in mind it is clear that each of the jurisdictional provisions over mergers and consolidations of railroads contained in Section 77 of the Bankruptcy Act and Section 5 of the Interstate Commerce Act as amended can be carried into effect without any repugnancy since both the District Court in Bankruptcy and

the Interstate Commerce Commission have full power within their respective jurisdictional spheres to exercise the authority granted to each by the Congress.

This Court held in Palmer v. Massachusetts, 308 U.S. 79, at p. 87, that "the judicial process in bankruptcy proceedings under Section 77 is as it were brigaded with the administrative process of the Commission." The foregoing opinion was written prior to the amendment of Section 5 of the Interstate Commerce Act by the Transportation Act of 1940; and it is evident that if this Court then held that the judicial process in bankruptcy proceedings under Section 77 was brigaded with the administrative process of the Commission, then under the plain and unmistakable verbiage of Section 5(11) of the Transportation Act of 1940, this rule of law has been confirmed by statutory enactment. To the same effect are Warren v. Palmer, 310 U.S. 132; Smith v. Hoboken R. Co., 328 U.S. 123, 130, 131; McLean Trucking Co. v. United States, 321 U.S. 67, 79, 80; and Reconstruction Finance Corp. v. Denver & R. G. W. Ry. Co., 328 U.S. 495, 509-512 and footnote 14 at p. 510. Compare Thompson v. Texas-Mexican Ry. Co., 328 U.S. 134, 144-147, as to the jurisdiction of the District Court in interstate commerce in proceedings under Section 77 of the Bankruptcy Act as affected by the passage of the Transportation Act of 1940.

In Benton v. Callaway, 165 F. (2d) 887, at p. 883, the holding of this Court in Palmer v. Massachusetts was again applied, and the majority opinion held that:

> ". . . Upon confirmation of the plan, which is subject to judicial review, the debtor, or any other corporation organized for the purpose of carrying out the plan, shall have full power to put it into

> effect; and shall do so: the laws of any state to the contrary notwithstanding. *Evidently there must be a real or substantial conflict between the plan and any state law before the latter may be disregarded.* The execution of the plan is 'subject to the supervision and control of the judge,' Sec. 205, sub. f, supra; and this ought to be assurance enough that state authority will be overridden only to the extent necessary to make the plan effective. . . ."

Writ of certiorari was granted by this Court in Cause No. 607 on March 15, 1948, but the dissenting opinion of Judge Hutcheson, 126 F. (2d) at p. 887, is in agreement with the majority holding on the foregoing rule of law.

The holding of the Circuit Court of Appeals that "proceedings for railroad reorganization under Section 77 of the Bankruptcy Act are wholly controlled by the terms thereof and that the provisions of Section 5 of the Interstate Commerce Act fixing terms and conditions for the merger and consolidation of railroads are not applicable thereto" is directly contrary to the construction of the provisions of Section 77 of the Bankruptcy Act given by this Court in the cited authorities.

3. In the absence of an affirmative finding by the Interstate Commerce Commission that the maintenance of the corporate structure of the Chicago, Rock Island and Gulf Railway Company as a Texas corporation would be in violation of the Constitution and laws of the United States, the District Court was without jurisdiction to enter that part of the consummation order and final decree ordering the merger and consolidation of the franchises and properties of the Texas corporation with the reorganized company and

directing the reorganized company under the supervision of the Reorganization Managers to dissolve the Texas corporation and to secure a permit for the reorganized company to own, maintain, and operate a railroad within the State of Texas in violation of the Constitution and laws of Texas.

The Circuit Court of Appeals held that the District Court "has authority to put into effect and carry out a plan approved in proper manner notwithstanding the laws of any state or the orders of any state to the contrary. The fact that the plan may infringe upon the Texas Constitution and laws is wholly immaterial against bankruptcy jurisdiction." (R, 268.)

In support of this statement the Circuit Court of Appeals cites the following decisions: In re N.Y., N.H. & H.R. Co., 147 F. 2d 40, 51 (CCA2, 1945), cert. den. 325 U.S. 884; Texas v. U. S., 292 U.S. 522; In re Missouri Pacific R. Co., 39 F. Supp. 436, 438; Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118, 68 S. Ct. 426.

Beginning with the case of Texas v. U. S., 292 U.S. 522 down to and including Seaboard Air Line Railway Co. v. Daniel, 333 U.S. 118 (68 S. Ct. Rep. 426), it has been well settled that where compliance with the Constitution and laws of the several States by railroad carriers would constitute an undue burden upon interstate commerce or would be not in accordance with the national transportation policy or consistent with the public interest, such laws are abrogated under the "Commerce Clause" of the Constitution of the United States.

However, under the facts contained in the cases cited by the Circuit Court of Appeals in its opinion, it is manifest that the Court in each case held that compliance with the laws of the several States would be

violative of the Commerce Clause of the Federal Constitution *due to the fact that the Interstate Commerce Commission had made affirmative findings in each of these cases that compliance with the state laws would (a) constitute an undue burden on interstate commerce, or (b) not be in accord with the national transportation policy, or (c) would not be consistent with the public interest.*

This is particularly true of the holdings of this Court in the case of Seaboard Air Line v. Daniel, 333 U.S. 118 (68 S. Ct. Rep. 426), wherein this Court did not discuss the question as to whether or not the constitutional and statutory provisions of the State of South Carolina imposed burdens on the Seaboard Air Line Co. in violation of the Commerce Clause of the Constitution of the United States. (68 S. Ct. p. 428, Footnote No. 4.)

The Circuit Court of Appeals held that the findings upon approval of the reorganization plan herein "are almost identical with those involved in Seaboard Air Line v. Daniel, "a proceeding under Section 5." (R, 269), and that the findings approved by the Supreme Court in that case and "the findings here are the equivalent of the findings there, there is no basis for holding that the order entered in the bankruptcy proceedings is in anywise inconsistent with Section 5(b) or other provisions of the Interstate Commerce Act or the Bankruptcy Act" (R, 269) which holding is in absolute conflict with the record herein.

The holding of this Court in Seaboard Air Line Co. v. Daniel was based—and solely based—upon findings of the Interstate Commerce Commission that compliance by the railway company with the state laws would result in "substantial delay and needless expense" and

that "compliance would not be consistent with the public interest," which was the criterion which Section 5 required the Interstate Commerce Commission to use in passing upon a change of ownership or control in railroads. (68 S. Ct. at page 428.) Again this Court said (68 S. Ct. Rep. at p. 430):

> "Furthermore, the Commission discussed the South Carolina requirements in its report and therein made findings that compliance by appellant with them 'would not be consistent with the public interest.' These references were made to the South Carolina provisions, according to the Commission's report, in response to the appellant's suggestion that it would 'avoid complications' if the Commission's report showed *'on its face that our order is intended to override them.'*"

Similar findings were made in Texas v. U. S., 292 U.S. 522 at pp. 532-533; In re Missouri Pacific Ry. Co., 39 F. Supp. 436 at pp. 448-449; and In re N. Y., N. H. & H. R. Co. 147 F. (2d) 40 at pp. 51, 52. Thus it would seem that in all of the cases cited in the opinion of the Circuit Court of Appeals there were *affirmative* findings by the Interstate Commerce Commission that compliance with state laws would not be in accord with the national transportation policy or inconsistent with the public interest or would constitute an undue burden on interstate commerce.

In the instant case there are no findings of any kind with reference to compliance with the Constitution and laws of the State of Texas (Appendix A), some of which were discussed in the case of Texas v. U. S., 292 U.S. at pp. 532-533. The sole findings of the Interstate Commerce Commission in the instant case are that "Acquisition by the reorganized company of the properties of the Chicago, Rock Island and Gulf conceded

as contemplated by the confirmed plan and is not, in our opinion, inconsistent with Section 5 or any other provisions or purpose of the Interstate Commerce Act," (R, 89) and "that the acquisitions will result in adequate transportation service to the public and will not be contrary to or inconsistent with the public interest is implicit in the Commission's findings approving the plan." (R, 266.)

In the case of Schwabacher v. U. S. (68 S. Ct. 958 at p. 967), this Court held "the Commission likely would not and *probably could not* be given plenary and exclusive jurisdiction to interpret and apply any state's law." This is not inconsistent with the dissenting opinion of Mr. Justice Frankfurter, 68 S. Ct. 958 at p. 971.

In this connection the Circuit Court of Appeals of its own motion has held that the proceedings before the Interstate Commerce Commission dated August 9, 1933, (193 I.C.C. 395) concerning consolidation of the principal debtor with its subsidiary corporations constituted a finding by the Interstate Commerce Commission in the present proceedings that such consolidation proceedings under Section 5 of the Interstate Commerce Act "was clearly in the public interest." (R, 262.)

It is respectfully submitted to this Court that the proceedings just referred to do not form a part of the record in this cause before the interstate Commerce Commission or the District Court of the United States or the Circuit Court of Appeals; and therefore the interpolation by the Circuit Court of Appeals of such finding for the purpose of basing a legal conclusion thereon is contrary to all judicial customs and precedents.

4. The failure of the approved plan of reorganization to provide for the preservation of the rights of the employees of the Chicago, Rock Island and Gulf Railway Company under the provisions of Section 5(2)(c) and (f) of the Interstate Commerce Act (49 U.S.C. Sec. 5) by a fair and equitable arrangement based upon evidence introduced at a hearing before the Interstate Commerce Commission, being inconsistent with the provisions of the Interstate Commerce Act as amended by the Transportation Act of 1940, rendered the plan, and the final decree of the District Court based thereon, invalid as a matter of law.

The original plan of reorganization was approved by the Interstate Commerce Commission on October 31, 1940, and in its supplemental report dated July 31, 1941 (247 I.C.C. 533, 576), the Interstate Commerce Commission made the following finding:

> "*On our own motion.*—In the plan, provision is made for the conveyance of all the property of the Chicago, Rock Island & Gulf Railway Company to the reorganized company. As a condition of our approval of such a transaction, we shall require a fair and equitable arrangement to protect the interests of the railroad employees affected, as required by law." (Original Record (p. 320) Printed Pamphlet (p. 195).)

Despite the finding of the Interstate Commerce Commission in its supplemental report of July 31, 1941, that as a condition for its approval of the plan of a fair and equitable arrangement to protect the interests of the employees of the Chicago, Rock Island and Gulf should be made as required by law, no steps were ever taken to comply with this requirement; and the absence of such provisions was called to the attention of

the District Court in the memorandum and suggestions of the State of Texas, as amicus curiae, on November 12, 1947 (R, p. 49), and again in the protest filed by the State of Texas before the Interstate Commerce Commission. (R, 135-136, Para. X.)

After this fundamental defect in the proposed plan had been thus drawn to the attention of the Reorganization Managers, who, undoubtedly recognizing the fact that absent such provision contained in the orders finally approving the plan, the plan would be violative of the provisions of Section 5 of the Interstate Commerce Act as amended and *inconsistent* therewith, inserted in the application to the Interstate Commerce Commission for final order at page 5 (R, 227) the following statement:

> "In accordance with the procedure established by the Commission in *Chicago & N.W. Ry. Co. Merger,* 267 I.C.C. 672, *the applicants have no objection to the order entered by the Commission on this Application providing conditions for the protection of employees substantially in the language of the statute.*"

Pursuant to the permission of the Reorganization Managers, the Interstate Commerce Commission proceeded *without any hearing as provided by law* to make the following finding in its final report of December 23, 1947 (R, 108-109):

> "The managers state that neither the Morris Terminal Company nor the Rock Island Improvement Company nor any of the subsidiary debtors whose properties are to be conveyed to the reorganized company except the Peoria Terminal Company have any railroad employees. For the same reasons as were set forth in Chicago & N. W. Ry. Co. Merger, 261 I.C.C. 672, we will condition

> our authorizations herein for the acquisitions of properties in substantially the terms of section 5(2) (f) of the Interstate Commerce Act, as amended, as was done in that case with respect to the authorization of the merger of certain properties. That will not bar the carriers and authorized representatives of employees from entering into agreements for the protection of the interests of the employees, as provided in the last sentence of said section 5(2) (f).

Based upon the foregoing finding, the Commission entered the following order (R, 117):

> "*It is further ordered,* That the authorizations herein granted for the acquisitions of the described properties are upon the conditions (in addition to the other conditions stated) that during the period of 4 years from the date of this order such transactions will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the date of this order than the period during which such employee was in the employ of such carrier or carriers prior to the date of this order."

The duty of the Interstate Commerce Commission in certifying a plan of reorganization to the District Court under the provisions of Section 77 of the Bankruptcy Act is plainly set forth in Akron, Canton and Youngstown Railway Co. v. Hagenbuch, 128 F. (2d) 932, 937 (cert. den. 318 U.S. 794), wherein it was stated that:

> "The Commission's report should contain its findings of fact and such findings must be consistent with the evidence."

It is manifest that in the absence of a hearing no evi-

dence can be introduced upon which to base a finding, and it being undisputed from the record that no hearing was had or any evidence upon which the finding or the foregoing order of the Commission of December 23, 1947, could be based, no fair and equitable arrangement for the preservation of the rights of the employees of the Chicago, Rock Island and Gulf Railway Company is contained in the plan.

However, the opinion of the Circuit Court of Appeals does discuss at length the proceedings wherein the Gulf Trustees applied to the Interstate Commerce Commission under Section 5(4) for authority to lease their properties and their estate to the Rock Island Trustees until the termination of the reorganization proceedings (R, 263, 264), and by inference holds that there being no employees of the Texas corporation, since they became employees of the debtor corporation, their rights were fully protected under the order of the Interstate Commerce Commission dated December 23, 1947, although the opinion of the Circuit Court of Appeals does not refer specifically to this order. The attention of the Circuit Court of Appeals was called to such omission by proper assignments of error (Point IX, R, 217-218) and again in the petition for rehearing (Assignment of Error VIII, R, 277), but the Circuit Court of Appeals failed to rule thereon.

It is manifest from the proceedings before the Interstate Commerce Commission in 1939 (230 I.C.C. 181; 233 I.C.C. 21), which culminated in the decree of this Court in United States v. Lowden, 308 U.S. 225, that the Interstate Commerce Commission granted the authority to lease the properties of the Texas corporation to the debtor corporation upon condition that a fair and equitable arrangement for the

preservation of the rights of the employees of the Texas corporation should be entered into.

This arrangement consisted of four provisions (230 I.C.C. 181 at pp. 187-189). Part of the first provision was as follows:

> "No employee of the trustees of The Chicago, Rock Island and Pacific Railway Company and the trustees of The Chicago, Rock Island and Gulf Railway Company, hereinafter designated as the carriers, who is continued in service shall, *for a period of five years from the commencement of operation under the said lease but not beyond the date of termination, for either carrier, of the reorganization proceedings under section 77 of the Bankruptcy Act,* be placed, as a result of operation under said lease, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of operation under said lease, . . ."

These provisions were made a part of the order of the Commission effective forty days after April 3, 1939 (233 I.C.C. 21, at p. 26), and hence would expire of their own terms May 12, 1944. Hence on January 1, 1948, the effective date of the termination of the lease, no fair and equitable arrangement existed for the protection of the interests of the railway employees affected by the conveyance of the properties of the Chicago, Rock Island and Gulf Railway Company to the Reorganized Company in accordance with the express condition imposed by the Interstate Commerce Commission of its own motion on July 31, 1941 (247 I.C.C. 533, at p. 576).

It is evident that as early as 1941 the Commission realized that the affirmative requirements of Subsection 2(c) and (f), Section 5 of the Interstate Com-

merce Act as amended by the Transportation Act of 1940, in the light of the ruling of the Supreme Court of the United States in U. S. v. Lowden, 308 U.S. 225, must be strictly complied with in order to validate the proposed plan, inasmuch as the Interstate Commerce Commission conditioned its approval of the plan upon the making of a fair and equitable arrangement to protect the interests of the railroad employees affected being the railroad employees of the Chicago, Rock Island and Gulf Railway Company.

Under the rulings of this Court referred to in Paragraph (2) of this argument, it is manifest that the plan of reorganization was inconsistent with the terms and provisions of Section 5 of the Interstate Commerce Act and hence in violation of Section 77(f) of the Bankruptcy Act, and that the failure of the Circuit Court of Appeals to pronounce a direct ruling upon the assigned error has presented an important question of Federal law for the decision of this Court.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

THE STATE OF TEXAS, *Petitioner,*

By PRICE DANIEL,
Attorney General of Texas
By C. K. RICHARDS,
Assistant Attorney General
Counsel for Petitioner.

APPENDIX A

The Constitution of the State of Texas provides in Article X thereof as follows:

"Sec. 3. Every railroad or other corporation, organized or doing business in this State under the laws or authority thereof, shall have and maintain a public office or place in this State for the transaction of its business, where transfers of stock shall be made and where shall be kept for inspection by the stockholders of such corporations, books, in which shall be recorded the amount of capital stock subscribed, the names of the owners of the stock, the amounts owned by them respectively, the amount of stock paid, and by whom, the transfer of said stock, with the date of the transfer, the amount of its assets and liabilities, and the names and places of residence of its officers. The directors of every railroad company shall hold one meeting annually in this State, public notice of which shall be given thirty days previously, and the President or Superintendent shall report annually, under oath, to the Comptroller or Governor, their acts and doings, which report shall include such matters relating to railroads as may be prescribed by law. The Legislature shall pass laws enforcing by suitable penalties the provisions of this Section."

"Sec. 6. No railroad company organized under the laws of this State, shall consolidate by private or judicial sale or otherwise with any railroad company organized under the laws of any other State or of the United States."

"Sec. 8. No railroad corporation in existence at the time of the adoption of this Constitution, shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this Constitution applicable to railroads."

The pertinent provisions of Title 112, Revised Civil Statutes of Texas, 1925, Railroads (Vol. 18, Vernon's Annotated Civil Statutes), are as follows:

"Art. 6260. No corporation, except one chartered under the laws of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or maintain any railways within State. (Acts 1903, p. 90.) (18 V.A.C.S., p. 3.)

"Art. 6275. Every railroad company chartered by this State, or owning or operating any line of railway within this State, shall keep and maintain permanently its general offices within this State at the place named in its charter for the location of its general offices. If no certain place is named in its charter where its general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices at such place within this State where it contracts or agrees to locate its general office for a valuable consideration. (Acts 1889, p. 130; G. L. vol. 9, p. 1158.) (18 V.A.C.S., p. 9.)

"Art. 6281. The principal business of said corporation shall be conducted, and stock transferred and claims for damages settled and adjusted at the *public* or general *offices* of said railroad companies in Texas, established as provided for in this chapter, by duly authorized officers and agents of said corporations. (Acts 1885, p. 67; G. L. vol. 9, p. 697.) (18 V.A.C.S., p. 14.)

"Art. 6287. The public office of a railroad corporation shall be considered the domicile of such corporation. (Acts 1876, p. 150; G. L., vol. 8, p. 986.) (18 V.A.C.S., p. 15.)

"Art. 6479. The terms, 'road,' 'railroad,' 'railroad companies,' and 'railroad corporations,' as used herein, shall be taken to mean and embrace all corporations, companies, individuals and as-

sociations of individuals, their lessees or receivers, appointed by any court whatsoever, that may now or hereafter own, operate, manage or control any railroad, or part of a railroad, in this State, and all such corporations, companies and associations of individuals, their lessees or receivers, as shall do the business of common carriers on any railroad in this State.

"1. *The provisions of this chapter shall be construed to apply to and affect only the transportation of passengers, freight and cars, between points within this State;* . . . (Acts 1925, p. 365.) (39th Leg., ch. 154, § 1.) (18 V.A.C.S., pp. 377-378.)

V.A.C.S. is the abbreviation for Vernon's Annotated Civil Statutes, 1925 Edition.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 257

IN THE MATTER OF
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

DEBTOR.

STATE OF TEXAS,

Petitioner,

vs.

EDWARD E. BROWN, ET AL., ETC.,

Respondents.

MOTION BY CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY FOR LEAVE TO INTERVENE AND BE RANGED AS A RESPONDENT, AND BRIEF OF SAID RAILROAD COMPANY AS INTERVENOR.

W. F. PETER,
Counsel for Chicago, Rock Island and Pacific Railroad Company,
1025 La Salle Street Station,
Chicago 5, Illinois.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Respondents.

MOTION BY CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY FOR LEAVE TO INTERVENE AND BE RANGED AS A RESPONDENT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Chicago, Rock Island and Pacific Railroad Company respectfully states:

1. Said railroad company is the reorganized company in the above entitled proceeding. By virtue of a Consummation Order and Final Decree of the United States District Court for the Northern District of Illinois, Eastern Division, entered on December 30, 1947, it is the owner of and is in possession of and operating the lines of railway

and other properties transferred to it on January 1, 1948, including that portion of said lines of railway situated within the State of Texas.

2. Petitioner, the State of Texas, appealed to the Circuit Court of Appeals for the Seventh Circuit to set aside and reverse that part of the Consummation Order and Final Decree which authorizes and approves the transfer to and acquisition by said railroad company of its railway properties situated in the State of Texas.

3. Said railway company was not made a party to said appeal, but pursuant to its petition to the Circuit Court of Appeals that it be allowed to participate in the proceedings on appeal by filing its brief and being heard at the oral argument, the Circuit Court of Appeals, by order entered on March 31, 1948, granted the permission as requested. Thereafter, counsel for said railroad company filed a brief and argued orally at the hearing in support of the Consummation Order and Final Decree.

4. Said railroad company, although it is not named as respondent to the petition herein for a writ of certiorari, has a direct interest in the matter involved and in the validity of said Consummation Order and Final Decree.

WHEREFORE, Chicago, Rock Island and Pacific Railroad Company prays that it be admitted as an intervenor and as a party respondent and adversely to the relief prayed for by said petitioner, and that it be granted such other and further relief as may be proper.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

By W. T. Faulkner

Its Attorney,

1025 La Salle Street Station,
Chicago 5, Illinois.

SUBJECT INDEX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

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THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

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vs.

EDWARD E. BROWN, ET AL., ETC.,

Respondents.

BRIEF OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, INTERVENOR, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioner seeks to review an order (R. 270) of the United States Circuit Court of Appeals for the Seventh Circuit, entered June 2, 1948, affirming a Consummation Order and Final Decree entered on December 30, 1947, by the District Court of the United States in the proceeding for the

reorganization of The Chicago, Rock Island and Pacific Railway Company and subsidiary debtors.

Intervenor, Chicago, Rock Island and Pacific Railroad Company, was caused to be organized by the Reorganization Managers, pursuant to pertinent provisions of the plan of reorganization, for the purpose of carrying out the plan. Its Certificate of Incorporation was granted by the State of Delaware on December 16, 1947. The Consummation Order and Final Decree transferred to, and vested in, the new company title to all the properties of the Trustees of the several debtors, together with their business and affairs, all as of 12:01 A. M. January 1, 1948. On that date, the new company became the owner of, and has been continuously thereafter in possession of and operating, its railroad properties; these comprise a system of 7,650 miles of railroad extending into or through 14 states, including 637 miles in and across Texas.

Prior to the appointment of the Trustees, December 1, 1933, the lines in Texas were owned and operated by a wholly owned subsidiary of the principal debtor, namely, The Chicago, Rock Island and Gulf Railway Company, a corporation organized under the laws of Texas. Separate trustees were appointed by the District Court for the properties of the Gulf Company, and the separate operation of the Gulf properties was continued by its trustees until said trustees leased the same to the Trustees of the principal debtor for the duration of the trusteeship, pursuant to approval obtained from the Interstate Commerce Commission under Section 5(4) of the Interstate Commerce Act. (R. 263) Said lease was consummated on September 1, 1939, and continued in effect during the remainder of the trusteeship period.

The plan of reorganization provided that "To the reorganized company shall be conveyed all the properties of (1)

The Chicago, Rock Island and Pacific Railway Company, (2) The Chicago, Rock Island and Gulf Railway Company" and other named subsidiary debtors (257 I. C. C. 307, 321). The provision that the reorganized company should own all the properties of the principal and subsidiary debtors was contained in the Commission's original report, issued October 31, 1940 (242 I. C. C. 298, 445), and was carried forward without change in the several supplemental reports. On November 7, 1940, the Commission transmitted copies of its original report and order to the governors of each of the 14 states in which the debtor's property was located. Commissioner Porter's letter of transmittal specifically called attention to the provision of the plan providing for the merger into one company of the constituent companies of the Rock Island system. In its supplemental report of December 23, 1947, the Commission said (R. 89):

> "Hearings have been held on the plan by this Commission at various times over a period beginning on October 6, 1936. Copies of the proposals and notice of the earlier hearings were duly sent to the Governor of the State of Texas. The State has never intervened in the proceedings nor made any representations to us with respect to the proposals."

These facts are important in connection with petitioner's claim of deprivation of due notice and opportunity to be heard, and violation of due process of law (Specification of Errors, 1 and 2).

QUESTION PRESENTED.

The single, fundamental question of the case is whether the Rock Island plan of reorganization was effective to require the constitutional and statutory provisions of the State of Texas, one of the 14 states in which are situated the railroads included in the reorganization, to give way to the provisions made by the Interstate Commerce Commission in the reorganization plan and found by it to be compatible with the public interest, and confirmed by the District Court.

ARGUMENT.

The Reorganization Plan and the Commission's Order of December 23, 1947, Comply With the Statutory Requirements. (Petitioner's Argument, Points 1 and 2.)

Section 77 of the Bankruptcy Act, as amended, in subsection (f) provides:

> "Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any state or the decision or order of any state authority to the contrary notwithstanding. * * * Upon confirmation of a plan, the Commission shall without further proceedings, grant authority for the * * * transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and *not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended.*"

Petitioner construes the italicized clause as bringing into play not merely the substantive provisions and purposes of the Interstate Commerce Act—Section 5 in this case—but all of the procedural provisions of Section 5 prescribed therein in connection with a transaction proposed under sub-paragraph (a) by a carrier or carriers applying to the Commission for authority to consolidate, purchase, lease, or acquire control of another carrier, etc. The substantive provisions are two-fold:

(1) That the proposed transaction is within the scope of sub-paragraph (a), and

(2) Will be consistent with the public interest.

The procedural provisions are that the Commission shall notify the governor of each state in which is situated any part of the properties of the carriers involved in the proposed transaction, shall afford reasonable opportunity for interested parties to be heard, and shall hold a public hearing on the application where carriers by railroad are involved.

The original and the supplemental reports of the Commission make it plain that all these things, substantive and procedural, were done, although the Commission did not label them as having been done pursuant to Section 5. The fact is that both of the substantive requirements of Section 5 of the Interstate Commerce Act have their counterparts in Section 77 of the Bankruptcy Act. The plan provision for acquisition by the reorganized company of the properties of the several debtors was one of the kinds of transactions enumerated in Section 5(a); and the "public interest" finding was made by the Commission*, not once but several times in its successive reports:

> "We find that the plan herein approved * * * will be compatible with the public interest." (Original Report, October 31, 1940, 242 I.C.C. at 465.)
>
> "We conclude: The report and order of the Commission dated October 31, 1940, approving a plan of reorganization for the Chicago, Rock Island & Pacific Railway Company, pursuant to Section 77 of the Bankruptcy Act, as amended, should be modified as herein specified, and that as thus modified the plan * * * will be compatible with the public interest, and should be approved."
>
> (Supplemental Report, July 31, 1941, 247 I.C.C. at 576.)

"Upon the amplified record now before us, we conclude that the report and order of October 31, 1940,

---

* In Section 5(b) the phrase is "will be consistent with the public interest". In subsection (d) of Section 77, the phrase is "will be compatible with the public interest". As the Circuit Court of Appeals stated, the words consistent and compatible are synonymous. (R. 268.)

as modified by the supplemental reports and orders of July 31 and October 2, 1941, * * * should be further modified as herein specified, and that as thus modified, the plan * * * will be compatible with the public interest, and shall be approved."

(Supplemental Report and Order of January 3, 1944, 257 I.C.C. at 289.)

As respects the procedural requirements of Section 5(b), it will be recalled that the Commission gave notice to the governors of each of the 14 Rock Island states by its letter of November 7, 1940, with which was transmitted a copy of the plan dated October 31, 1940, although Section 77 contains no such requirement. Likewise, the Commission held public hearings on the plan at various times over a period beginning October 6, 1936; notices of their earlier hearings were duly sent to the Governor of Texas. (R. 89) Subsection (d) of Section 77 requires notice of such hearings to be given only "to all stockholders and creditors."

Thus the Commission satisfied not only the provisions of Section 77, which we contend furnished the sole requirements, but took such action as was sufficient to comply with the substantive and procedural provisions of Section 5 regardless of their applicability.

The foregoing state of facts affords no legitimate ground for complaint of lack of due process. Petitioner's specific complaint is that it was not allowed to be heard on its written protest filed with the Commission in response to the application of the Reorganization Managers for authority to carry out the confirmed plan by issuing the new securities, transferring the property, etc., in accordance with subsection (f) of Section 77. That protest was against the granting of the application of the Reorganization Managers insofar as it requested authorization for acquisition by the reorganized company of the properties of The Chicago, Rock Island and Gulf, on the ground the provi-

sions of the plan were legally ineffective because of being based upon assumed authority of the Commission under Section 77, and were not the results of proceedings under Section 5 of the Interstate Commerce Act; also that the constitution and statutes of Texas prohibit the acquisition of The Chicago, Rock Island and Gulf by any railroad not incorporated in that state. (R. 88)

To appraise the validity of petitioner's complaint of illegal deprivation of due notice and opportunity to be heard on its protest, it will be helpful to set forth the successive steps prescribed for a reorganization begun and completed under Section 77:

1. Filing of petition by debtor.

2. Approval of petition by Court.

3. Appointment of Trustees.

4. Miscellaneous administrative orders (filing of claims; reports by Trustees, etc.).

5. Filing of plan or plans of reorganization.

6. Hearings on proposed plans by Commission.

7. Approval of plan, and hearing on objections thereto, by Commission and certification to the Court.

8. Hearing by Court on plan.

9. Approval by Court of plan.

10. Submission by Commission of plan to vote of creditors.

11. Certification by Commission to Court of result of vote.

12. Confirmation of plan by the Court.

13. Selection and approval of Reorganization Managers.

14. Application of Reorganization Managers to Commission for authority to issue securities, transfer properties, etc.

15. Commission's order of authorization.

16. Consummation Order and Final Decree.

The notices heretofore referred to gave petitioner ample opportunity to appear and be heard as an interested party at any of the hearings provided for at Steps Nos. 6, 7 or 8. Petitioner's first participation was attempted at Step 14. Its right to do so is negatived by the express provisions of subsection (f) of Section 77:

> "Upon confirmation of a plan the Commission shall, *without further proceedings,* grant authority for the issue of any securities, assumption of obligations, transfer of property * * * to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended."

The Commission's office at this stage is wholly supervisory; it must see whether the Managers' proposals are in accord with the plan and do not fall short of or go beyond its provisions. The Commission must also see that they are consistent with Section 5 of the Interstate Commerce Act; to do this, it needs merely to lay the plan alongside of Section 5 and determine whether the provisions of the plan transgress the standards of Section 5, *i.e.,* that if the plan involves consolidation, merger, purchase, lease or acquisition of control of carrier properties, the same "will be consistent with the public interest".

The purpose of this summary proceeding after a plan has been confirmed is not to afford the parties an opportunity to litigate issues that were raised, or might have been raised, during the prior stages and that had been settled by the orders of the Commission and the several orders of the Court approving and confirming the plan. The Commission's task was wholly administrative in nature; it performed this task and formally announced its conclusions. It has done everything that the law requires.

If petitioner had a right to a hearing upon the issues tendered by its protest to the granting of the Reorganization Managers' application, it must follow that any and every other party who felt aggrieved at some provision of the plan had a similar right. This would mean relitigating the old issues, together with any new ones that might be brought forward, thus making the reorganization proceeding an endless round.

The notice given by the Commission to the Governor of Texas on December 8, 1947 was not impelled by the notice requirements of Section 5 of the Interstate Commerce Act; it was given pursuant to the Commission's self-imposed practice. It is unnecessary to inquire why the Commission considered it appropriate to adopt this practice; Section 77 directs the Commission to grant authority "without further proceedings", subject to the condition that the matters authorized shall be "to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act." The Commission's task is to examine the authorizations requested by the Reorganization Managers and determine whether they comport with the plan and are consistent with the Interstate Commerce Act. It is entirely lawful for the Commission to perform this task *in camera;* if it desires to notify any one of its own accord, it may do so in the manner and with such attendant privileges as it sees fit.

The Commission Has Made All of the Findings Required by Section 77 of the Bankruptcy Act. (Petitioner's Point 3.)

Petitioner alleges that the District Court lacked jurisdiction to enter that part of the Consummation Order and Final Decree transferring the Texas properties to the reorganized company (R. 188) in the absence of an affirmative

finding by the Commission "that the maintenance of the corporate structure of The Chicago, Rock Island and Gulf Railway Company as a Texas corporation would be in violation of the constitution and laws of Texas". The findings which petitioner believes the Commission must make before the laws of a state may be disregarded are set forth on page 32 of its brief, namely: that compliance with state laws would (a) constitute an undue burden on interstate commerce, or (b) not be in accord with the national transportation policy, or (c) would not be consistent with the public interest. Only the last-mentioned, relating to public interest, is required by the Bankruptcy Act or the Interstate Commerce Act. Neither statute requires specific findings of undue burden on interstate commerce or lack of accord with the national transportation policy. It is true that the Commission in various cases arising under Section 5 of the Interstate Commerce Act has made specific findings on one or both of these points, but in so doing, the Commission was merely showing in what respects the public interest was affected in those particular cases by an enforced compliance with state laws. There may be a variety of circumstances which affect the public interest. For example, in *United States* v. *Lowden*, 308 U. S. 225, the public interest involved had reference to protecting displaced employees of a railroad which leased its properties to another company. Section 5(b) provides simply that if the Commission finds that the proposed transaction "will be consistent with the public interest, it shall enter an order approving and authorizing such action", etc. Section 77 (d) requires that the Commission's report and order approving the plan shall set forth its opinion that the plan "will be compatible with the public interest". The Commission followed the standard legal practice of stating its findings in the lan-

guage of the statute. The same is true of its finding contained in the Supplemental Report of December 23, 1947:

> "Acquisition by the reorganized company of the properties of the Chicago, Rock Island & Gulf concededly is contemplated by the confirmed plan and is not, in our opinion, inconsistent with Section 5 or any other provision or purpose of the Interstate Commerce Act." (R. 89.)

Alleged Failure of the Plan to Provide for the Preservation of the Rights of the Employees of The Chicago, Rock Island and Gulf Railway Company.

After the enactment of paragraphs (c) and (f), Section 5 of the Interstate Commerce Act relative to protection of the interests of railroad employees who shall be affected by consolidations, mergers, leases, sales, etc. of railroad properties, the Commission had occasion to consider what would constitute fair and equitable arrangements for affected employees. That subject presented generally uniform aspects, and as a result of its accumulating experience, the Commission worked out a form of order providing conditions for the protection of employees substantially in the language of the statute.

The Commission's practice was thus stated by it in *Chicago & North Western Railway Company Merger*, 261 I. C. C. C. 672, 675:

> "In all proceedings under section 5(2) we have given consideration to 'the interest of the carrier employee affected' as required in paragraph (c) of that section. Our procedure has been such that (1) in cases in which it was definitely shown that no employees would be affected, we have so stated and held that no condition was necessary; (2) in cases in which it was not definitely shown that employees would not be affected, we have reserved jurisdiction; and (3) in cases in which it appeared that employees would be

affected, we have prescribed conditions as required in section 5(2)(f) or conditions as agreed upon by the parties.

"In our opinion, whether jurisdiction be reserved or conditions prescribed in the statutory language is not a matter of material importance, the employees being protected in either case. However, it may be that a uniform practice in cases such as those classified in clauses (1) and (2) above will avoid future procedural difficulties. Accordingly, in this case, and in future cases in these two classes under section 5(2) of the act, we think it proper that conditions be imposed in the language of the statute as requested by the intervener herein, with only such modification of the terminology thereof as appears necessary."

The Commission followed its established procedure in the instant case. We submit that this constituted a full compliance with the law.

But aside from the foregoing, petitioner's contentions are defective for the following reasons:

1. Petitioner has cited no statute which gives its attorney general the power, *ex officio*, to represent railroad employees, citizens of Texas, in the enforcement of their private rights.

2. The record does not disclose that there are any railroad employees affected by the acquisition and operation of the Texas lines by the reorganized company.

3. The term of the lease made by Chicago, Rock Island and Gulf Railway Company Trustees in 1939 was for the duration of the bankruptcy proceedings. 233 I. C. C. 21. After the lessee entered into possession, those of the former Gulf employees who were retained in service, became employees of the lessee. It is apparent, therefore, that there were no Gulf employees to protect and no subject matter for protective conditions to operate on.

Conclusion.

Since the enactment of the Transportation Act by Congress in 1921, the State of Texas has waged many battles before the Interstate Commerce Commission and the Federal Courts against exercises of federally granted powers of foreign railroad corporations. In none of these has it been successful. The instant case involves no principles that have not already been decided adversely to Texas. Both the Interstate Commerce Commission and the District Court have followed and complied with statutory requirements. The petition should be denied.

Respectfully submitted,

W. F. Peter,
Counsel for Chicago, Rock Island and Pacific Railroad Company.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

NO. 257

In the Matter of

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

STATE OF TEXAS,

Petitioner,

vs.

EDWARD E. BROWN, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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Chicago, Illinois, October 6, 1948.

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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STATE OF TEXAS,

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

This brief is filed on behalf of the Reorganization Managers under the Plan of Reorganization for The Chicago, Rock Island and Pacific Railway Company, in opposition to the petition of the State of Texas for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, dated June 2, 1948, in *State of Texas* v. *Edward E. Brown et al., Reorganization Managers,* 168 F. 2d 587. That judgment affirmed the Consummation Order and Final Decree entered on December 30, 1947, by the District Court of the United States for the Northern District of Illinois, Eastern Division, in proceedings for the reorganization of The Chicago, Rock Island and Pacific Railway Company and several of its subsidiaries under Section 77 of the Bankruptcy Act.

Texas' petition for certiorari is the last remaining item of litigation involving the reorganization proceedings for

The Chicago, Rock Island and Pacific Railway Company, which extended over a fifteen-year period and resulted in final approval by the Interstate Commerce Commission of a Plan of Reorganization on May 1, 1944, subsequent approval and confirmation of the Plan by the courts, and its successful consummation early in 1948.

The appeal taken by the State of Texas to the Circuit Court of Appeals related to the provision of the Consummation Order and Final Decree (R. 188) for the transfer of the properties of The Chicago, Rock Island and Gulf Railway Company (hereinafter called the Gulf Company), a wholly-owned subsidiary of the principal debtor, to the reorganized company, a newly organized Delaware corporation, pursuant to the Plan of Reorganization (R. 87-88). The Gulf Company is a Texas corporation (R. 177). The properties owned by it prior to January 1, 1948, consisting of three disconnected lines of railroad totalling about 622 miles, are situated in the State of Texas (R. 68). The Gulf Company was a subsidiary debtor in the reorganization proceedings, and the Plan of Reorganization applied to it as well as to seven other subsidiary debtors and the principal debtor (R. 177).

Although the reorganization proceedings were instituted in 1933, the State of Texas, notwithstanding notices sent to it by the Interstate Commerce Commission (R. 89), took no part before either the Commission or the District Court until October 1947, when it asked and was granted leave to file an *amicus* memorandum with the District Court in support of its objections to the Managers' petitions for authority to form a Delaware corporation as the reorganized company and to file an application with the Commission for authority to proceed with the consummation of the Plan (R. 2-3, 44, 45-49). After an adjourned hearing on those petitions, they were granted (R. 50-76, 226). The State of Texas also filed a lengthy "Protest" to the Managers' application

with the Commission, restating its position, which involved the merits of the Plan of Reorganization that the Commission had long since approved and the courts had approved and confirmed, rather than the only matter that was left at that time, the consummation of the Plan (R. 126-138). The Commission rejected Texas' protest and granted the Managers' application (R. 86). The Commission's order issued on December 23, 1947, and the Consummation Order and Final Decree was entered by the District Court, after notice and hearing, on December 30, 1947. At that hearing Texas intervened pursuant to leave granted and restated its objections, which the District Court overruled (R. 86, 154-155, 158-166, 173-174, 177). Texas immediately appealed (R. 212). Its requests for a stay were denied both by the District Court, on December 30, 1947, and by the Circuit Court of Appeals, after oral argument, on December 31, 1947.

The State of Texas contended before the Circuit Court of Appeals that the District Court had no authority under Section 77 of the Bankruptcy Act to order the consummation of the Plan, providing as it did for the vesting of the Gulf properties in a corporation not organized under the laws of Texas and contemplating operation of those properties by such a corporation, in the face of a Texas statute requiring railroads in that state to be owned and operated by a Texas corporation, because in the formulation of the Plan, according to the Texas argument, the Interstate Commerce Commission was bound to comply with the provisions of Section 5 of the Interstate Commerce Act, relating to the voluntary consolidation of railroad properties, and it had not done so. Essentially, as the Circuit Court of Appeals observed (R. 261), Texas sought by its appeal "to go back and review the validity of the plan," which had been approved in final form by the Commission on May 1, 1944, and by the District Court on June 15, 1945. Texas also com-

plained of a denial of procedural due process in the failure of the Commission to send it a copy of the routine amendment of the Reorganization Managers' application for authority to proceed with the consummation of the Plan, filed with the Commission on December 19, 1947 (R. 236), and in the refusal of the Commission to hold a hearing on the application at which it could appear.

The Circuit Court of Appeals, in affirming the Consummation Order and Final Decree, held that the controlling statute was Section 77 of the Bankruptcy Act, under which the provisions of the Plan to which Texas objected were authorized, notwithstanding conflicting state laws; that the provisions of Section 77, both procedural and substantive, had been fully observed, including the requirement of subsection f that upon confirmation of a plan the Commission should, "without further proceedings, grant authority for the * * * transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes" of the Interstate Commerce Act; and that there had been no denial of procedural due process to the State of Texas at any stage of the reorganization proceedings, from their inception on June 7, 1933, down to and including the entry of the Consummation Order and Final Decree on December 30, 1947.

Respondents submit that the ruling of the Circuit Court of Appeals was clearly correct and not contrary to any decision of this Court or in conflict with the decision of any other Circuit Court of Appeals, that the petition for certiorari presents no question of law meriting review by this Court, and that the petition should, therefore, be denied.

I.

THE CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE CONSUMMATION ORDER AND FINAL DECREE.

A. Texas Has Had Due Notice and Opportunity To Be Heard at All Stages of the Reorganization Proceedings.

The reorganization proceedings were instituted on June 7, 1933, and hearings on the Plan began before the Commission in 1936. The Commission in its report and order of December 23, 1947, recites (R. 89):

> "Copies of the proposals and notice of the earlier hearings were duly sent to the Governor of the State of Texas. The State has never intervened in the proceedings nor made any representations to us with respect to the proposals."

Included in the notices sent by the Commission to the State of Texas was specific notice of the provisions of the Plan to which objection is now made (R. 61; 242 I. C. C. at page 445). The Circuit Court of Appeals observed (R. 265):

> "From the beginning, the State of Texas has had notice. Thus, in 1940, the Commission advised the Governor of Texas of the pendency of the proceedings before it and sent to him a copy of its order in 242 I. C. C. 455, in which it commented that, under the proposal, the reorganized company would own all property of the debtor and its subsidiaries including the Gulf Railroad Company. So far as the record discloses, the State took no action in response to this notice, although it had full notice that it was proposed to take over the Gulf properties, contrary, as it claimed, to the conflicting state statutes."*

*Prior to 1940, in three other proceedings before the Commission, Texas had indicated its opposition to the consolidation and unified operation of the Rock Island properties, but that opposition had been overruled. See 193 I.C.C. 395 (1933), 221 I.C.C. 611 (1937), 230 I.C.C. 181 (1938), 233 I.C.C 21 (1939), and *infra*, pp. 10-12.

Four years having passed during which Texas had had notice and ample opportunity to be heard, seven more elapsed before the terms of the Plan were finally fixed, but the state still took no action. The Plan was approved in final form by the Commission on May 1, 1944, and by the District Court on June 15, 1945, voted upon by creditors, and confirmed by the District Court in orders entered May 23, 1947, and June 26, 1947. The District Court's order of approval was affirmed by the Circuit Court of Appeals (157 F. 2d 241), and its orders of confirmation were entered pursuant to that court's instructions (160 F. 2d 942 and 162 F. 2d 257). This Court denied petitions for certiorari from both the approval order and the confirmation order. 329 U. S. 780; 68 S. Ct. 21, 163. Texas delayed its appearance throughout the entire period and came in to object for the first time in October 1947 at a hearing which, as the Circuit Court of Appeals observed (R. 265-266), "had to do not at all with the terms of the plan," but only with formal authorization for the Managers to proceed to carry it out, "after the time for objection to approval had passed and after the time for confirmation had passed."

On the foregoing record the Circuit Court of Appeals was obviously right in concluding that Texas had been given due notice and ample opportunity to be heard prior to its protest filed with the Commission in December 1947, so that the Commission's refusal to hold a hearing on that protest was not a denial of anything to which, at that stage of the proceedings, Texas had a right under Section 77 of the Bankruptcy Act or under the Constitution—"a far cry from deprivation of due process" (R. 266), for, as the court said (R. 266):

> "The attempt to object long after the plan had been approved and long after it had been confirmed, is too tardy an application to deserve consideration and one which we think is not contemplated at that stage under the Bankruptcy Act."

Such an application is not contemplated because, by the express terms of Section 77(f), the Commission is directed, upon confirmation of a plan, to grant, *without further proceedings,* authority for its consummation to the extent contemplated by the plan and not inconsistent with the Interstate Commerce Act. The holding of the Circuit Court of Appeals was in accordance with the statute (R. 267):

> "The only duty of the Commission, on the managers' application, was to assure itself that the transfer and other proposed transactions were those contemplated by the approved and confirmed plan and were not inconsistent with the Interstate Commerce Act. In that situation we think the Commission was entirely justified in declining to entertain the Texas objections which were, in effect, an effort to change the terms of an approved and confirmed plan, to which the State had never objected."

The action of the Commission in sending copies of the Reorganization Managers' application to the governors of the states, including Texas, in which the Rock Island system is located, was in addition to any procedural requirements under Section 77. No further hearings were required on the terms of the Plan, and none was contemplated. The fact that the Commission did not send to Texas a copy of a minor amendment to the application is therefore immaterial.* Texas was permitted to present its objections in writing, but when the Commission found that they were nothing but belated objections to certain substantive provisions of the approved and confirmed Plan of Reorganization, identical with those that had been considered by the Commis-

*The amendment covered three items: (1) it corrected a statement in the original application with regard to employees, so as to inform the Commission that Peoria Terminal Company, reference to which had been inadvertently omitted in the original application, was the only subsidiary debtor that had any employees (compare R. 227 with R. 237); (2) it supplied the Commission with a computation showing the amount of common stock needed to satisfy the claims of general creditors as allowed by the District Court (R. 238); and (3) it substituted for the original Exhibit S (Pro Forma Balance Sheet of the Reorganized Company) an Exhibit S Revised (R. 239).

sion in three prior proceedings involving unification of the Rock Island properties,* it properly concluded that the objections were not such as it could then entertain and that the request for a hearing should be denied.

B. The Controlling Statute Is Section 77 of the Bankruptcy Act, and Its Provisions Have Been Complied With in All Respects.

Notwithstanding its holding that the Texas objections to the terms of the Plan came too late, the Circuit Court of Appeals considered them on the merits and concluded that nothing urged by Texas could have prevailed in the formulation of the Plan, even if it had been presented at the proper time and place (R. 268-269). This conclusion was clearly right under the several decisions of this Court dealing with railroad reorganization under Section 77.

Texas intervened in the reorganization proceedings to object to certain terms of the Plan. It claimed procedural and substantive rights under Section 5 of the Interstate Commerce Act, which deals with voluntary consolidations. The Circuit Court of Appeals quite properly ruled that the authority for the terms of the Plan and the rules governing its formulation were to be sought in Section 77 of the Bankruptcy Act (R. 267, 268-269). "Railroad reorganization in bankruptcy is a field completely within the ambit of the bankruptcy powers of Congress." *Warren* v. *Palmer*, 310 U. S. 132, 137 (1940). See also *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1942), and *Group of Institutional Investors* v. *Milwaukee R. Co.*, 318 U. S. 523 (1942).

The holding that conflicting state laws must yield to the terms of an approved and confirmed plan (R. 261-266) was also in accord with the decisions of this Court in *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648 (1935), and *Palmer*

*See *infra*, pp. 10-12.

v. *Massachusetts,* 308 U. S. 79 (1939), as well as *In re New York, New Haven & Hartford R. Co.,* 147 F. 2d 40, 51 (C.C.A. 2, 1945), cert. den. 325 U. S. 884, and *In re Missouri Pacific R. Co.,* 39 F. Supp. 436, 448 (D. C., E. D. Missouri, 1941).

Since the consolidation of properties contemplated by the Plan was plainly authorized by Section 77, subsections b and f, it only remained for the Circuit Court of Appeals to consider whether it was also "not inconsistent with the provisions and purposes" of the Interstate Commerce Act. The decisions of this Court show that the consolidation provided in the Plan of Reorganization was wholly consistent with the provisions of the Interstate Commerce Act, and particularly Section 5 thereof. *Texas* v. *United States,* 292 U. S. 522 (1934); *Seaboard Air Line R. Co.* v. *Daniel, Attorney General of South Carolina,* 333 U. S. 118 (1948); *Schwabacher* v. *United States,* 334 U. S. 182 (1948).

The test of approval under Section 5, as the statute states and as this Court has repeatedly held, is that the acquisition must be "consistent with the public interest," and the Commission must so find after due notice and opportunity for hearing afforded to interested persons. Under Section 77(d) the entire plan must be "compatible with the public interest," and the Commission must so find after due notice and opportunity for hearing afforded to interested persons. "Compatible" means "consistent with." The test, the finding, and due process under the two statutes are essentially the same. The only difference between the two statutes is that Section 5 deals with voluntary consolidations, whereas Section 77 deals with plans of reorganization including involuntary consolidations. The requirements of Section 77 were strictly followed in this case; none of the restrictions of Section 5 were violated by the transfers called for by the Plan; and by these tokens the affirmative provisions and purposes of Section

5 were inevitably satisfied.* To find that the terms of the Plan were "compatible with the public interest," as the Commission did in its reports from 1940 to 1944, was to find at the same time that they were "not inconsistent with" Section 5, for the public interest is also the requirement of that section. The Circuit Court of Appeals so held (R. 268-269), and with the *Seaboard* case as a guide it could not have held otherwise.

Whether acting under Section 5 or under Section 77, the power exercised by the Commission is exclusive and plenary, for the bankruptcy power, no less than the commerce power, is a paramount federal power as against conflicting state laws. *Seaboard Air Line* case, *supra; Schwabacher* v. *United States,* 334 U. S. 182, 187 (1948); *Palmer* v. *Massachusetts,* 308 U. S. 79, 88, 89 (1939); *Continental Bank* v. *Rock Island Ry. Co.,* 294 U. S. 648 (1935). Neither Section 5 nor Section 77 requires the Commission to find that a state of facts, such as the ownership and operation of the Gulf properties by a separate corporation, is an "undue burden on interstate commerce," as a prerequisite to the exercise of an exclusive and plenary constitutional power.

If there were any necessity for a finding expressly under Section 5 of the Interstate Commerce Act that unified ownership and operation of the Rock Island and its subsidiaries, including the Gulf Company, is in the public interest, such

*Petitioner argues, as it did before the Circuit Court of Appeals, that the Commission failed to follow the Plan, and authorized an inconsistency with Section 5, because it made no provision for the Gulf employees. Such provision was made in the order by which the Commission, in a Section 5 proceeding, authorized the Rock Island trustees to operate the Gulf properties until the termination of the reorganization proceedings. See 230 I.C.C. 181 (1938); 233 I.C.C. 21 (1939); *United States* v. *Lowden,* 308 U. S. 225 (1939). The Gulf employees then became employees of the Rock Island trustees until, on January 1, 1948, they became, like all other employees of the trustees, employees of the reorganized company, for whose protection conditions were included in the Commission's order of December 23, 1947. R. 108-109, 117. The Commission could not be asked to deal with a non-existent situation, but it did deal with the existent situation in providing for all employees and in so doing, of course, it observed the Plan and did nothing inconsistent with Section 5.

a finding was in fact made by the Commission in another proceeding. The Rock Island is probably unique as a railroad system with respect to which the Commission has formally found, not once but twice—first under Section 5 and then under Section 77—that unification of ownership and operation would be in the public interest. In addition, the matter of unified operation alone, without regard to ownership, has been before the Commission two times, and in the second of those proceedings it was approved.

The first proceeding, under Section 5, was had on the application filed on May 17, 1932, by the parent company and its subsidiaries, including the Gulf Company, for authority to consolidate their properties in one unified ownership and operation, in which, on August 9, 1933, the Commission entered an order of approval, without prejudice, however, to the reorganization proceedings, which had been instituted on June 7, 1933. At a hearing held in Texas the State failed to appear, after having indicated a desire to protest. The Texas constitution and statutes requiring the maintenance of separate local corporate organizations of railroads operating within that state were, however, considered by the Commission, but it found that unification of ownership and operation in a single corporation was clearly in the public interest and that Congress had empowered it to act, notwithstanding the limiting Texas laws. The anticipated savings and the simplification of operations were fully discussed on the basis of evidence submitted. 193 I. C. C. 395 (1933).

The second proceeding was instituted on December 31, 1935, during the reorganization proceedings, by the trustees of the debtor and its subsidiaries, for authority under Section 5(4) of the Interstate Commerce Act to merge operations of the properties in the several estates. The State of Texas intervened in this proceeding. The Commission in its report discussed the savings that would result from the

merged operations but concluded that the prayer of the petition was not within the language of the statute. 221 I. C. C. 611 (1937).

The third proceeding, again during reorganization, was instituted by the Gulf trustees on November 8, 1937, for authority under Section 5(4) of the Interstate Commerce Act to lease the Gulf properties to the Rock Island trustees until the termination of the reorganization proceedings. The Rock Island trustees applied for authority to enter into and accept such a lease. Again the State of Texas intervened, and a hearing was held. The application was approved. The Commission found that the proposed lease, upon certain terms and conditions, would be in harmony with and in furtherance of its plan for consolidation of railroad properties in general. The objections of the State of Texas, based on its conflicting statutes, were considered and overruled. 230 I. C. C. 181 (1938); 233 I. C. C. 21 (1939). On appeal, taken by the Rock Island trustees with respect to certain of the conditions relating to the Gulf employees, this Court held in *United States* v. *Lowden*, 308 U. S. 225 (1939), that the conditions objected to were authorized by Section 5(4). Consequently, under authority of the Commission's order, the Gulf properties were leased to the Rock Island trustees in September 1939, the Gulf trustees ceased to operate them, and their employees became employees of the Rock Island trustees.

Unified ownership and operation of the Rock Island is now an accomplished fact, as a result of the reorganization under Section 77. It is self-evidently compatible and consistent with the public interest, but in addition had been shown repeatedly to the Commission to be so, and the Commission had found, and knew officially from its own published reports, that it was so. The proposition of the State of Texas that another Section 5 proceeding should have been held to make the nonessential finding that the Gulf

corporation was a burden on interstate commerce, or that an express finding to that effect was required in the reorganization proceedings, before the Plan could properly be approved and put into effect, does not merit consideration by this Court.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT OR WITH ANY DECISION OF THIS COURT.

The petitioner has cited *In re Central Railroad Company of New Jersey,* 136 F. 2d 633 (1943), cert. den. 320 U. S. 805, *Railroad Commission of California* v. *Pacific Gas & Electric Co.,* 302 U. S. 388 (1938), and *Windsor* v. *McVeigh,* 93 U. S. 274 (1876), in support of its argument that it was denied procedural due process. They are all cases holding that notice and opportunity to be heard are essential. The facts heretofore recited, which were fully considered by the Circuit Court of Appeals, show that the rule of those cases was never violated, for at no time when Texas was entitled to notice and at no time when it had a right to be heard was it denied. The State of Texas never availed itself of its rights. Notwithstanding that fact, when it finally made an appearance after its right to be heard on the terms of the Plan had expired, it was given special consideration, both by the Interstate Commerce Commission and the District Court.

In the construction of Section 77, it is claimed that the Circuit Court of Appeals held contrary to the ruling of this Court in *Palmer* v. *Massachusetts,* 308 U. S. 79 (1939), and in conflict with the ruling in *Benton* v. *Callaway,* 165 F. 2d 877 (C. C. A. 5, 1948), cert. granted 68 St. Ct. 736. Neither contention is correct.

Abandonment of service during the course of reorganization was involved in *Palmer* v. *Massachusetts,* and the

holding of this Court was that the District Court could not, in prejudice to a state proceeding for abandonment that had been duly instituted and was in progress, independently and as a matter of administration of the debtor's estate, authorize and direct it to abandon the contested service. We are not concerned with administration of the debtor's estate in this case, but with the validity of the terms of an approved and confirmed plan of reorganization. As to such plans, this Court was careful to state in *Palmer* v. *Massachusetts* (308 U. S. 88, 89):

> "In view of the judicial history of railroad receiverships and the extent to which §77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, except as part of a complete plan of reorganization for an insolvent road."
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> "It is not without significance that after four years no reorganization plan for the New Haven has yet been evolved. Perhaps it is no less true that amenability to state laws will serve as incentive to the formulation of reorganization plans which, on approval by the Commission, do supplant state authority."

The holding of the Circuit Court of Appeals in the present proceeding, like those in the *New Haven* case, 147 F. 2d 40, 51 (C. C. A. 2, 1945), cert. den. 325 U. S. 884, and the *Missouri Pacific* case, 39 F. Supp. 436, 448 (D. C., E. D. Missouri, 1941), was in compliance with, rather than contrary to, the views of this Court expressed in *Palmer* v. *Massachusetts.*

The holding in *Benton* v. *Callaway* has no bearing whatever on the present litigation. The ruling of the majority in

that case was that a reversionary fee simple interest in a railroad, owned by a corporate lessor not in bankruptcy, was not a part of the bankrupt lessor's estate that was subject to the exclusive jurisdiction of the bankruptcy court under Section 77, that the question whether acceptance of an offer to purchase the lessor's interest required the approval of all stockholders of the lessor, or only a majority in interest, was a matter of state law, and that the bankruptcy court had no jurisdiction to enjoin a suit brought in an appropriate state court for the determination of that question. In the Rock Island proceedings, the Gulf Company was one of the subsidiary debtors in the reorganization proceedings, and the Plan was mandatory with respect to the consolidation of the properties, irrespective of state law. In the Central of Georgia plan involved in *Benton* v. *Callaway*, the bankruptcy power was not asserted to require property of an owner not in reorganization to be conveyed to the reorganized company, but the matter was left to the agreement of the parties, to offer and acceptance.

For the foregoing reasons, respondents pray that the petition for certiorari be denied.

Respectfully submitted,

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